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Kelly Anne Davis

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Minimizing the Putative Father's Rights: *In re Adoption of Clark*

The question of what rights, if any, to accord a putative father¹ concerning his nonmarital child is one that has plagued many courts.² The problem facing these courts is resolution of the apparent conflict between the interests of the father and those of the child. Courts must balance the father's interest in custody of his child against the child's interest in completing the adoption process as quickly as possible.³ The North Carolina Court of Appeals recently examined these competing interests in *In re Adoption of Clark*.⁴

Specifically, the court addressed the issue of a putative father's rights to his child once an adoption petition has been filed.⁵ The court held that if the putative father fails to take any steps to legitimate his child before the filing of the adoption petition, he has no rights⁶ and his consent to the adoption is unnecessary.⁷ The court reached this decision even though the father was not at fault for failing to initiate legitimation proceedings.⁸

This Note traces United States Supreme Court decisions which address the issue of an unwed father's rights. It then looks at North Carolina law regarding adoption and termination of parental rights. It goes on to address some of the

1. A "putative father" is "[t]he alleged or reputed father of an illegitimate child." BLACK'S LAW DICTIONARY 1113 (5th ed. 1979).

2. See *Shoecraft v. Catholic Social Servs. Bureau*, 222 Neb. 574, 578-80, 385 N.W.2d 448, 452 (1986) (statute authorizing an unwed mother to give legally effective unilateral consent to adoption if unwed father fails to file notice of intent to claim paternity within 5 days after child's birth does not deny due process or equal protection); *In re Steve B.D.*, 112 Idaho 22, 25-26, 730 P.2d 942, 945 (1986) (when unwed father has failed to develop a substantial relationship with child and has not been denied the opportunity by the state, the state is not required to obtain father's consent to child's adoption); *Wells v. Children's Aid Society of Utah*, 681 P.2d 199, 203 (Utah 1984) ("state's strong interest in immediate and secure adoptions for eligible newborns provides a sufficient justification for significant variations in the parental rights of unwed fathers who, in contrast to mothers, are not automatically identified by virtue of their role in the process of birth.").

3. See *In re Steve B.D.*, 112 Idaho at 25-26, 730 P.2d at 945 ("because of a child's urgent need for permanence and stability, the unwed father must act quickly to take responsibilities and establish ties"); *Wells v. Children's Aid Soc. of Utah*, 681 P.2d 199, 204 (Utah 1984) (interests of unwed father and his child conflict); *Interest of Ice*, 35 Ill. App.3d 783, 785-86, 342 N.E.2d 460, 462 (1976) (best interests of child balanced against right of natural parent to the custody of his child).

4. 95 N.C. App. 1, 381 S.E.2d 835 (1989).

5. *Id.* at 4, 381 S.E.2d at 837.

6. North Carolina courts historically have accorded the putative father only minimal rights. See *Jolly v. Queen*, 264 N.C. 711, 714-15, 142 S.E.2d 592, 595-96 (1965) (mother has paramount right to custody of her illegitimate child, putative father not entitled to custody without showing the mother is unfit); *In re Doe*, 11 N.C. App. 560, 562-63, 181 S.E.2d 760, 762 (1971) (validity of consent of unwed mother to adoption of child was not affected by putative father's subsequent legitimation proceeding wherein child was declared legitimate; thus putative father's consent would not be necessary in any pre-legitimation adoption proceeding).

7. *In re Adoption of Clark*, 95 N.C. App. at 9-10, 381 S.E.2d at 840 ("Since the record clearly shows Mr. Lampe failed to take any steps before the filing of the adoption petition to legitimate this child, we hold Mr. Lampe's consent to this adoption is unnecessary pursuant to Section 48-6(a)(3).") (citing N.C. GEN. STAT. § 48-6(a)(3) (1984)).

8. *Id.* at 8, 381 S.E.2d at 839. ("[A] putative father's knowledge of the existence of his illegitimate child is not relevant to a proper analysis of the necessity of a putative father's consent under section 48-6(a)(3).").

problems that are created by the court of appeals' decision in *In re Adoption of Clark*. It concludes that the decision greatly diminishes the putative father's rights and that other ways of protecting the interests of the child are needed in order to avoid minimizing the father's rights.

Stephanie Clark gave birth to a child in August 1983 without telling the child's natural father, Christian Lampe.⁹ Clark then relinquished all of her rights to the child to an adoption agency, Family Services.¹⁰ After making some attempts to locate Lampe, which amounted to calling one of the two listings under the name "Lampe" in the Winston-Salem telephone directory,¹¹ Family Services petitioned the court to terminate Lampe's parental rights based on his failure to take steps to legitimate the child.¹² Family Services served notice of the termination hearing by publication¹³ and the trial court entered an order terminating Lampe's parental rights.¹⁴ The adoptive parents then filed a petition to adopt the child and the clerk of court entered an interlocutory adoption decree.¹⁵

Family Services later wrote Lampe requesting information about his background in order to assist the child.¹⁶ The letter was the first knowledge Lampe had of the child's existence.¹⁷ Lampe then moved to set aside the termination order on the ground that the service by publication was invalid because Family Services failed to exercise due diligence in attempting to locate him.¹⁸ The district court set aside the termination order and the court of appeals affirmed.¹⁹

Family Services and the adoptive parents continued to pursue adoption proceedings.²⁰ At a hearing to determine whether Lampe's consent was necessary to the proposed adoption, the clerk of court concluded that such consent was not necessary because Lampe failed to take any steps to legitimate or support the child before the adoptive parents filed the petition.²¹ The superior court reversed the clerk, concluding that Lampe's consent was necessary before the adoption could continue, and dismissed the adoption petition.²² Family Services and the adoptive parents appealed.

The North Carolina Court of Appeals reversed the lower court, holding that because Lampe failed to take any steps before the filing of the adoption petition to legitimate the child, his consent to the adoption was unnecessary.²³

9. *Id.* at 3, 381 S.E.2d at 836.

10. *Id.*

11. *Id.* at 12, 381 S.E.2d at 842 (Cozort, J., dissenting).

12. *Id.* at 3, 381 S.E.2d at 836.

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.* at 3-4, 381 S.E.2d at 836.

20. *Id.* at 4, 381 S.E.2d at 837.

21. *Id.*

22. *Id.*

23. *Id.* at 9, 381 S.E.2d at 840. The court also addressed two other issues: (1) whether the trial court erroneously dismissed the adoption proceeding based on the petitioners' failure to join the

The court reasoned that the nonmarital child's future welfare should not depend on whether the putative father knows of the child's existence at the time the adoption petition is filed.²⁴ The court noted that the General Assembly had weighed the putative father's rights against the child's need for a stable home and selected the date the adoption petition is filed as the date before which the father must take some step to legitimate or support the child.²⁵ The court concluded that placing the responsibility of discovering the birth of nonmarital children on putative fathers is not unreasonable.²⁶

Judge Cozort dissented. He argued that the majority's "holding ignores the fact that the father could not have attempted to legitimate the child because he had no knowledge of the child; and he had no knowledge due to the petitioners' lack of diligence . . ." ²⁷ Judge Cozort went on to argue that the court should not be a "party to such flaunting of the father's rights and the rules of law."²⁸

The United States Supreme Court has addressed the issue of an unwed father's rights in several cases. The Court initially afforded an unwed father's parental rights some constitutional protection in *Stanley v. Illinois*.²⁹ *Stanley* involved an Illinois statute which, upon the death of the mother, declared children of unwed fathers wards of the state without first requiring a hearing to determine parental fitness or any proof of neglect.³⁰ Married fathers and unwed mothers could not be deprived of their children without such a showing, however.³¹ The Court concluded that

[A]s a matter of due process of law, Stanley was entitled to a hearing on his fitness as a parent before his children were taken from him and that, by denying him a hearing and extending it to all other parents whose custody of their children is challenged, the State denied Stanley the equal protection of the laws guaranteed by the Fourteenth Amendment.³²

Stanley thus established that an unwed father's right to custody of his nonmarital child merits at least some constitutional protection.³³

putative father at the time the original adoption petition was filed, and (2) whether it erroneously dismissed the proceedings based on the petitioners' initial failure to file an affidavit under North Carolina General Statute Section 48-13 that the putative father's consent was not necessary under Section 48-6(a)(3). *Id.* at 4, 381 S.E.2d at 837. The court held that the trial court could not dismiss the adoption proceedings based on the petitioners' failure to name the putative father as a party without first giving the petitioners the opportunity to join the father within a reasonable time. *Id.* at 6, 381 S.E.2d at 838. It also held that the trial court erroneously dismissed the adoption petition for failure to comply with Section 48-13 at the time of the original filing, because the petitioners' affidavit relates back to the date the original petition was filed. *Id.* at 11, 381 S.E.2d at 841.

24. *Id.* at 8, 381 S.E.2d at 839.

25. *Id.* at 9, 381 S.E.2d at 840.

26. *Id.*

27. *Id.* at 13, 381 S.E.2d at 842 (Cozort, J., dissenting).

28. *Id.* (Cozort, J., dissenting).

29. 405 U.S. 645 (1972).

30. *Id.* at 646-47.

31. *Id.* at 646.

32. *Id.* at 649. See also *Miller v. Miller*, 504 F.2d 1067, 1067-68 (9th Cir. 1974) (Oregon statute permitting adoption of child born out of wedlock upon consent of natural mother, without notice to, or consent of, natural father constitutionally null and void and unenforceable).

33. *Stanley*, 405 U.S. at 652 ("at the least, Stanley's interest in retaining custody of his children

The Court addressed the scope of this new constitutional right to a hearing on parental fitness in *Quilloin v. Walcott*.³⁴ *Quilloin* involved a putative father's attempts to prevent the adoption of his child by the husband of the child's mother.³⁵ The Court concluded that a Georgia statute requiring only the mother's consent for the adoption of an illegitimate child and allowing the father veto authority over the adoption only if he had legitimated the child³⁶ did not violate the putative father's rights under the due process³⁷ and equal protection clauses.³⁸ The Court based its decision on the father's failure to shoulder any significant responsibility for the child's upbringing.³⁹ *Quilloin* thus placed two limitations on the parental rights of unwed fathers:

(1) a putative father's failure to show a substantial interest in his child's welfare and to employ methods provided by state law for solidifying his parental rights . . . will remove from him the full constitutional protection afforded the parental rights of other classes of parents; and (2) the parental rights of a demonstrably disinterested putative father may be subordinated when in conflict with the interests of an existing, recognized family unit of which his child is a member.⁴⁰

In *Caban v. Mohammed*⁴¹ the Court again evaluated an unwed father's rights in light of the degree of responsibility he had shown toward his children. *Caban* involved the adoption of children by their natural mother's husband without the natural father's consent.⁴² The New York statute in question gave an unwed mother the authority to block the adoption of her child simply by withholding consent, but did not give the unwed father similar control.⁴³ The father could prevent the termination of his parental rights only by showing that the best interests of the child would not permit the child's adoption by the petitioning couple.⁴⁴ The Court held that this sex-based distinction between unwed mothers and unwed fathers violated the equal protection clause because it bore no substantial relation to any important state interest.⁴⁵ The Court qualified its

is cognizable and substantial"). See Note, *The Unwed Father and the Right to Know of His Child's Existence*, 76 KY. L.J. 949, 950 (1988); Note, *Notice of Relinquishment: The Key to Protecting the Rights of Unwed Fathers and Adoptive Parents*, 67 NEB. L. REV. 383, 385-86 (1988) (hereinafter Note, *Notice of Relinquishment*); Comment, *Removing the Bar Sinister: Adoption Rights of Putative Fathers*, 15 CUMB. L. REV. 499, 503 (1985).

34. 434 U.S. 246 (1978).

35. *Id.* at 247.

36. *Id.* at 255-56.

37. U.S. CONST. amend. XIV. ("No State shall . . . deprive any person of life, liberty, or property, without due process of law . . .").

38. U.S. CONST. amend. XIV. ("No State shall . . . deny to any person within its jurisdiction the equal protection of the laws . . .").

39. *Quilloin*, 434 U.S. at 256 ("[H]e has never exercised actual or legal custody over his child, and thus has never shouldered any significant responsibility with respect to the daily supervision, education, protection, or care of the child.").

40. Note, *The Putative Father's Parental Rights: A Focus on "Family"*, 58 NEB. L. REV. 610, 617 (1979).

41. 441 U.S. 380 (1979).

42. *Id.* at 382-84.

43. *Id.* at 386-87.

44. *Id.* at 387.

45. *Id.* at 388-94.

holding, however, by emphasizing that the father had established a substantial relationship with the children and had admitted his paternity.⁴⁶ *Caban* and *Quilloin* thus established that an unwed father has no absolute parental rights in the absence of significant parental interest.⁴⁷

In *Lehr v. Robertson*⁴⁸ the Court found the right to notice of adoption proceedings depends on the degree of responsibility the putative father has accepted for his child's care. The putative father in *Lehr* filed a petition to vacate an adoption order because of lack of notice of the adoption proceedings.⁴⁹ The Supreme Court affirmed the denial of the petition, holding that because the putative father had never established a significant relationship with his child, failure to give him notice of pending adoption proceedings did not deny him due process or equal protection.⁵⁰ The Court reached this conclusion despite the state's actual knowledge of the putative father's existence and location.⁵¹ The Court pointed out that the putative father could have guaranteed notice of any adoption proceedings by mailing a postcard to the putative father registry.⁵² According to the Court, the Constitution extends greater protection to unwed fathers who have the "biological link" to the child and who have developed a substantial relationship with the child than to unwed fathers who have only the "biological link."⁵³

North Carolina's adoption laws define the rights of unwed fathers and their children. At the opening of the chapter on adoptions, the General Assembly states that its primary purpose is to protect children;⁵⁴ its secondary purpose is to protect biological and adoptive parents; and that when the interests of a child and parent conflict, the interests of the child prevail.⁵⁵ The General Assembly

46. *Id.* at 392-93.

47. *Caban v. Mohammed*, 441 U.S. 380, 393-94 (1979); *Quilloin v. Walcott*, 434 U.S. 246, 256 (1978). See also *In re Application of S.R.S. and M.B.S.*, 225 Neb. 759, 768-69, 408 N.W.2d 272, 278-79 (1987) (adoption could not proceed without putative father's consent where child was no longer a newborn and had established strong ties with father who had acknowledged and supported him).

48. 463 U.S. 248 (1983).

49. *Id.* at 250.

50. *Id.* at 264-68.

51. *Id.* at 264-68. One commentator criticized the result in *Lehr* because it deprived "an unwed father of notice and an opportunity to be heard, and ultimately of any legal connection with his daughter, despite the fact that the presiding judge, the mother, and the potential adoptive father knew where and how to locate the natural father, and were aware of his intent and incipient attempts to claim paternity." Comment, *Lehr v. Robertson: Unwed Fathers and Adoption—How Much Process Is Due?*, 7 HARV. WOMEN'S L.J. 265, 266 (1984).

52. *Lehr*, 463 U.S. at 264.

53. *Id.* at 262.

54. See *Oxendine v. Department of Social Servs.*, 303 N.C. 699, 708, 281 S.E.2d 370, 376 (1981) ("in any case involving the adoption of a child, the court's paramount concern is the child's welfare"); *In re Daughtridge*, 25 N.C. App. 141, 148-49, 212 S.E.2d 519, 523-24 (1975) (employed "best interests of the child" standard).

55. The North Carolina General Statutes provide:

The General Assembly hereby declares as a matter of legislative policy with respect to adoption that—

(1) The primary purpose of the Chapter is to protect children from unnecessary separation from parents who might give them good homes and loving care, to protect them from adoption by persons unfit to have the responsibility of their care and rearing, and to protect them from interference, long after they have become properly adjusted in their

balanced the interests of the child against the interests of its biological parents and determined that the interests of the child are paramount.⁵⁶

As part of this balancing process, the General Assembly determined that in certain situations the interests of the child are so paramount that the consent of the parents to the child's adoption is not required. Specifically, the statute states that the putative father's consent is unnecessary unless prior to the filing of the adoption petition: (1) paternity has been judicially established; (2) the child has been legitimated; or (3) the father has provided substantial support or consistent care to the child and mother.⁵⁷ The statute expressly requires the consent of the parents absent one of the exceptions.⁵⁸ Further, a final order of adoption effectively divests the biological parents of all rights with respect to the child.⁵⁹ The court of appeals in *Rhodes v. Henderson*⁶⁰ reached the same result, holding that: "[a] final decree of adoption for life terminates the relationship between the natural parents and the child, and the natural parents are divested of all rights with respect to the child."⁶¹

Under the North Carolina General Statutes, termination of parental rights

adoptive homes by biological parents who may have some legal claim because of a defect in the adoption procedure.

(2) The second purpose of this Chapter is to protect the biological parents from hurried decisions, made under strain and anxiety, to give up a child, and to protect adoptive parents from assuming responsibility for a child about whose heredity or mental or physical condition they know nothing, and to prevent later disturbance of their relationship to the child by biological parents whose legal rights have not been fully protected.

(3) When the interest of a child and those of an adult are in conflict, such conflict should be resolved in favor of the child; and to that end this Chapter should be liberally construed.

N.C. GEN. STAT. § 48-1 (1984).

56. *In re Adoption of Clark*, 95 N.C. App. 1, 8-9, 381 S.E.2d 835, 839-40 (1989).

57. The North Carolina General Statutes provide:

(a) The court shall determine whether the parent or parents of a child must give written consent to adoption of said child in accordance with the following provisions:

(3) In the case of a child born out of wedlock the consent of the putative father shall not be required unless prior to the filing of the adoption petition:

a. Paternity has been judicially established or acknowledged by affidavit which has been filed in a central registry maintained by the Department of Human Resources; provided, the court shall inquire of the Department of Human Resources as to whether such an affidavit has been so filed and shall incorporate into the case record the Department's certified reply; or

b. The child has been legitimated either by marriage to the mother or in accordance with provisions of G.S. 49-10, a petition for legitimation has been filed; or

c. The putative father has provided substantial financial support or consistent care with respect to the child and mother.

N.C. GEN. STAT. § 48-6(a)(3) (1984).

58. *Id.* at § 48-7(a).

59. Section 48-23 provides:

The following legal effects shall result from the entry of every final order of adoption:

(2) The biological parents of the person adopted, if living, shall, from and after the entry of the final order of adoption, be relieved of all legal duties and obligations due from them to the person adopted, and shall be divested of all rights with respect to such person. This section shall not affect the duties, obligations, and rights of a putative father who has adopted his own child.

N.C. GEN. STAT. § 48-23 (1984).

60. 14 N.C. App. 404, 188 S.E.2d 565 (1972).

61. *Id.* at 407, 188 S.E.2d at 567.

is directly correlated to the state's adoption laws. The grounds for terminating a putative father's parental rights are identical to the grounds which render his consent to an adoption unnecessary. Specifically, a putative father's parental rights may be terminated if, prior to the filing of a petition to terminate his parental rights, he has not either: established paternity, legitimated the child, or provided substantial support or consistent care to the child and mother.⁶²

Before a court enters a termination order, however, the putative father must have notice.⁶³ The court of appeals addressed the notice issue in *In re Clark*,⁶⁴ an earlier case involving the same parties as *In re Adoption of Clark*. The earlier litigation involved Mr. Lampe's challenge to an order terminating his parental rights.⁶⁵ The court of appeals upheld his challenge, holding that "due diligence is required in all parental rights termination cases before notice by publication can properly be used, and that [Family Services] failed to meet this requirement."⁶⁶ The court pointed to Family Services' reliance on information supplied solely by the mother and its failure to check public records which would have revealed Lampe's address.⁶⁷ *In re Clark* thus requires the exercise of due diligence in attempting to serve notice of a proceeding to terminate the putative father's parental rights.⁶⁸

The court in its later decision in *In re Adoption of Clark* stated, however, that termination of a putative father's rights prior to an adoption is not required since the grounds which render a putative father's consent to the adoption unnecessary are identical to the grounds for terminating his parental rights.⁶⁹ The court went on to hold that a putative father's consent to an adoption is unnecessary if he fails to take any steps to legitimate his child before the adoption peti-

62. Section 7A-289.32 provides in part:

The court may terminate the parental rights upon a finding of one or more of the following:

(6) The father of a child born out of wedlock has not prior to the filing of a petition to terminate his parental rights:

- a. Established paternity judicially or by affidavit which has been filed in a central registry maintained by the Department of Human Resources; provided, the court shall inquire of the Department of Human Resources as to whether such an affidavit has been so filed and shall incorporate into the case record the Department's certified reply; or
- b. Legitimated the child pursuant to provisions of G.S. 49-10, or filed a petition for this specific purpose; or
- c. Legitimated the child by marriage to the mother of the child; or
- d. Provided substantial financial support or consistent care with respect to the child and mother.

N.C. GEN. STAT. § 7A-289.32(6) (1989).

63. See *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950) ("Many controversies have raged about the cryptic and abstract words of the Due Process Clause but there can be no doubt that at a minimum they require that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case.").

64. 76 N.C. App. 83, 332 S.E.2d 196, *disc. rev. denied*, 314 N.C. 665, 335 S.E.2d 322 (1985).

65. *Id.* at 84, 332 S.E.2d at 197.

66. *Id.* at 84-85, 332 S.E.2d at 198.

67. *Id.* at 87, 332 S.E.2d at 199.

68. *Id.* at 87-88, 332 S.E.2d at 199-200.

69. *In re Adoption of Clark*, 95 N.C. App. at 7, 381 S.E.2d at 838-39 (citing N.C. GEN. STAT. § 48-6(a)(3) (1984) and § 7A-289.32(6) (1989)).

tion is filed.⁷⁰ The court relied on North Carolina General Statutes section 48-6 which states that a putative father's consent to an adoption is not required unless he has taken steps to legitimate the child prior to the filing of the adoption petition.⁷¹ According to the court, a putative father's knowledge of his child's existence is irrelevant to an analysis of the necessity of his consent under Section 48-6.⁷² The statute provides that the putative father's consent is unnecessary unless he takes steps to legitimate or support the child prior to the filing of the adoption petition; it makes no mention of the father's knowledge of the child's existence.⁷³ The court thus argued that the statute does not make the illegitimate child's future welfare dependent on "whether or not the putative father knows of the child's existence at the time the petition is filed."⁷⁴ The dissent argued that the father's failure to legitimate the child was due to the willful and negligent actions of the adoption agency and that the father should not suffer for those actions.⁷⁵

In re Adoption of Clark appears to be in accord with North Carolina statutory law. The decision furthers the primary legislative intent of making the child's interests paramount.⁷⁶ The adoption statutes operate smoothly in the usual situations when either the identity of the father is unknown or the father knows of the child and shows no interest in him. In these situations there *should* be provisions for making the father's consent to adoption unnecessary or the termination of his parental rights possible. The child's welfare should not depend upon a father whose identity might never be known or upon a father who does not care about him.

A problem arises in the application of these statutes, however, in a situation such as the one in *In re Adoption of Clark*. In that case the father's identity was known, but he never had the opportunity to take responsibility for his child before his parental rights were terminated. The court of appeals failed to consider this lack of opportunity when it decided *In re Adoption of Clark*.

The United States Supreme Court has never addressed directly the issue of whether this opportunity is required.⁷⁷ *Stanley, Quilloin, Caban, and Lehr* all involved situations in which the father had an opportunity to establish some kind of relationship with his child. The father in *In re Adoption of Clark*, in contrast, never had an opportunity to establish the significant relationship that *Quilloin, Caban, and Lehr* require. It is therefore difficult to make any pronouncements about whether *Clark* is in accord with these precedents.

70. *Id.* at 9, 381 S.E.2d at 840.

71. N.C. GEN. STAT. § 48-6(a)(3) (1984).

72. *In re Adoption of Clark*, 95 N.C. App. at 8, 381 S.E.2d at 839.

73. N.C. GEN. STAT. § 48-6(a)(3) (1984).

74. *In re Adoption of Clark*, 95 N.C. App. at 8, 381 S.E.2d at 839.

75. *Id.* at 12-13, 381 S.E.2d at 841-42 (Cozort, J., dissenting).

76. N.C. GEN. STAT. § 48-1 (1984).

77. Other courts also have addressed this issue. See *Catholic Charities of Archdiocese of Dubuque v. Zalesky*, 232 N.W.2d 539 (Iowa 1975) ("[A]bsent consent to . . . adoption of [an illegitimate] child . . . , [a known putative] father must be accorded meaningful opportunity to show he has significantly provided for the wants of his child and is ready, willing and able to thus provide for future wants of said child before a court can effectively terminate his parental rights.").

It is not difficult to determine *In re Adoption of Clark's* relationship to *In re Clark*. *In re Adoption of Clark* renders the court's earlier holding in *In re Clark* meaningless.⁷⁸ The majority held in *In re Adoption of Clark* that the putative father's consent to the adoption was not required because the adoptive parents filed the adoption petition before the putative father initiated legitimation proceedings.⁷⁹ This conclusion ignores the fact that the father could not legitimate the child because he had no knowledge of the child due to the adoption agency's lack of diligence,⁸⁰ a lack of diligence which the court found to be willful and negligent in its earlier *In re Clark* opinion.⁸¹ There does not seem to be much point in requiring due diligence before a termination order may be entered if an agency can avoid such a requirement by simply filing an adoption petition. Adoption agencies can now terminate the putative father's rights through the adoption process and the lack of a termination order is irrelevant.⁸²

Another problem with the court's decision in *In re Adoption of Clark* is that it encourages dishonesty, or at least the withholding of information, on the part of adoption agencies.⁸³ The putative father loses all parental rights if he fails to initiate legitimation proceedings before the adoption petition is filed, and it makes no difference that this failure is a result of the dishonest practices of an adoption agency that could have located him if it had made a realistic effort to do so. In this case there were only two listings under the name "Lampe" in the Winston-Salem telephone directory, and Family Services only called one of these numbers in its "search" for Christian Lampe.⁸⁴ If it had dialed the other number it almost certainly would have found Mr. Lampe, and he would have had more than adequate notice of the proceedings to terminate his parental rights.⁸⁵ Because of Family Services' failure to dial this other number, Mr. Lampe did not learn of the existence of his child until after the adoption petition had already been filed.⁸⁶ *In re Adoption of Clark* now officially encourages such questionable tactics on the part of adoption agencies. If the court had refused to

78. *In re Adoption of Clark*, 95 N.C. App. at 13, 381 S.E.2d at 842 (Cozort, J., dissenting).

79. *Id.* at 9, 381 S.E.2d at 840.

80. *Id.* at 13, 381 S.E.2d at 842 (Cozort, J., dissenting).

81. *In re Clark*, 76 N.C. App. 83, 87-88, 332 S.E.2d 196, 199-200 (1985).

82. *In re Adoption of Clark*, 95 N.C. App. at 7, 381 S.E.2d at 838 ("While termination of a putative father's rights may precede an adoption petition, prior termination of his rights under Chapter 7A is not necessary if, under the applicable provisions of Chapter 48, his consent to the adoption is not necessary."). This stance on the termination of parental rights and the adoption process appears to put North Carolina law in conflict with the law of several other states. See *In re Riggs*, 612 S.W.2d 461, 469 (Tenn. 1980), ("There can be no valid adoption without a valid termination of parental rights.") cert. denied, 450 U.S. 921 (1981); *State ex rel. Lewis v. Lutheran Social Servs. of Wisconsin and Upper Michigan*, 59 Wis. 2d 1, 3, 207 N.W.2d 826, 829 (1973) ("[I]t is not possible to give custody based upon adoption without a termination of parental rights.").

83. Appellee's Brief at 11, *In re Adoption of Clark*, 95 N.C. App. 1, 381 S.E.2d 835 (1989) (No. 8821SC916) (finding in favor of appellants "would open the door for adoption agencies to fraudulently or questionably obtain infants for adoption without following the proper statutory requirements").

84. *In re Clark*, 76 N.C. App. 83, 87, 332 S.E.2d 196, 199 (1985).

85. *Id.*

86. *In re Adoption of Clark*, 95 N.C. App. 1, 3, 381 S.E.2d 835, 836 (1989).

uphold the adoption order it would have chilled the use of such practices.⁸⁷ The court would have sent a clear message to adoption agencies that such practices are intolerable.⁸⁸ As a result, adoption agencies probably would be much more conscientious in their future searches for putative fathers. As the law now stands, there is no such incentive to locate putative fathers.

This lack of incentive to notify unwed fathers of the existence of their children gives rise to another problem with the court's decision: its diminishment of fathers' rights.⁸⁹ By refusing to consider the circumstances surrounding Lampe's failure to legitimate his child, the court effectively minimized putative fathers' rights. This minimization of fathers' rights, however, may be in accord with United States Supreme Court precedent. The Court applied a "substantial relationship/significant responsibility" standard in determining the father's rights in *Quilloin*, *Caban*, and *Lehr*.⁹⁰ In those cases the Court conditioned the father's rights on the degree of responsibility that the father had accepted for the child.⁹¹ The *Lehr* court went so far as to use custody as a measuring stick for the determination of parental rights. Under its analysis, states may allow only minimal legal rights to fathers who have not established custodial relationships with their children, but must accord greater rights to fathers who have established such relationships.⁹² A significant relationship analysis would afford Mr. Lampe only minimal parental rights because he never established any kind of relationship with his child.

Application of this standard to the *Clark* case is problematic because Mr. Lampe never had the opportunity to establish any kind of relationship with his child, much less a significant one.⁹³ "Without an opportunity to manifest love and responsibility for the infant, the unwed father is effectively precluded from

87. Appellee's Brief at 11-12, *In re Adoption of Clark*, 95 N.C. App. 1, 381 S.E.2d 835 (1989) (No. 8821SC916).

88. *Id.* ("[A] holding for the respondent will further public interest in that it will show adoption agencies the court's intolerance for questionable adoption practices.").

89. *In re Adoption of Clark*, 95 N.C. App. 1, 13, 381 S.E.2d 835, 842 (1989) (Cozort, J., dissenting).

90. *Lehr v. Robertson*, 463 U.S. 248, 267 (1983) (father failed to establish a "substantial relationship" with his daughter); *Caban v. Mohammed*, 441 U.S. 380, 393 (1979) (father had established "substantial relationship" with children); and *Quilloin v. Walcott*, 434 U.S. 246, 256 (1978) (father had never shouldered any "significant responsibility" with respect to the care of his child).

91. See *supra* notes 34-53 and accompanying text.

92. *Lehr*, 463 U.S. at 267-68 ("If one parent has an established custodial relationship with the child and the other parent has either abandoned or never established a relationship, the Equal Protection Clause does not prevent a State from according the two parents different legal rights.").

93. See *In re Adoption of Baby Boy Doe*, 717 P.2d 686, 690-91 (Utah 1986) (termination of putative father's parental rights by operation of statute when he failed to file notice of paternity prior to filing of adoption petition deprived him of due process rights when he had made known to mother his desire to keep child, he was not a Utah resident, mother had agreed to move to Arizona with him prior to child's birth, child was premature, and father was unaware of birth until three days later and one day after petition for adoption was filed); *Ellis v. Social Servs. Dep't of Church of Jesus Christ of Latter-Day Saints*, 615 P.2d 1250, 1256 (Utah 1980) ("[W]hen it is impossible for the father to file the required notice of paternity prior to the statutory bar, through no fault of his own [...] due process requires that he be permitted to show that he was not afforded a reasonable opportunity to comply with the statute."); *In re Riggs*, 612 S.W.2d 461, 468-69 (Tenn. 1980) (where unwed father went to great lengths to locate mother and his child in order to establish paternity and parent-child relationship, to prevent child's adoption, and to regain custody following such adoption, any lack of relationship between father and his child was not through fault of father, and father met tests of de

being able to fulfill the Supreme Court's standards under which he could receive parental rights in custody and adoption proceedings concerning his child."⁹⁴ When a putative father has the opportunity to establish a relationship with his child and fails to do so, as in *Quilloin v. Walcott*⁹⁵ and *Lehr v. Robertson*,⁹⁶ then there is no problem with according him only minimal parental rights.⁹⁷ The putative father, however, should have a chance to prove his worthiness as a parent before the *permanent* termination of his relationship with his child occurs.⁹⁸

The *Clark* court, however, refused to give the father such an opportunity. Its goal was protecting the interests of the child, with little concern for the interests of the father.⁹⁹ Although there is nothing wrong with making the interests of the child paramount, indeed the General Assembly has mandated this priority, there must be other ways of protecting the child's interests that do not flaunt the father's interests in the process. In its analysis the court assumed that the child's best interests and the putative father's best interests necessarily conflict.¹⁰⁰ This assumption is not necessarily correct. It may very well be in Daniel Clark's best interests to be in the custody of his natural father rather than in the custody of his adoptive parents.¹⁰¹ This issue will never be resolved, however, because the court automatically assumed that the child was better off with the adoptive parents without much attention to the benefits of the natural father having custody.¹⁰² Courts overseeing adoptions should have to examine the interests of the putative father and child on a case-by-case basis to determine whether a conflict exists before purporting to act in the child's best interests.

Another way of protecting the child's interests, without diminishing the father's interests, is simply to require that adoption agencies make more stringent efforts to locate the putative father when the identity of that father is known.¹⁰³ All that need be required is that adoption agencies follow the court's

facto fatherhood; therefore, father was entitled to minimal due process of law before child could be adopted), *cert. denied*, *Riggs v. Terrazus*, 450 U.S. 921 (1981).

94. Note, *Notice of Relinquishment*, *supra* note 33 at 389. See also Note, *The Putative Father's Due Process Rights to Notice and a Hearing*: *In re Baby Boy Doe*, 1986 B.Y.U. L. REV. 1081, 1087 (1986) ("[W]hat if the father is afforded no opportunity to develop an ongoing relationship with his child?").

95. 434 U.S. 246, 251 (1978) (father provided support on irregular basis, child was eleven years old, child expressed desire to be adopted).

96. 463 U.S. 248, 262 (1983) (father knew of child's existence and did not seek to establish any legal ties until after child was two years old).

97. See *Sanchez v. L.D.S. Social Servs.*, 680 P.2d 753, 754-55 (Utah 1984) (father knew of mother's pregnancy, knew of potential adoption, did not protest mother's decision to place child for adoption).

98. See *supra* notes 59-61 and accompanying text.

99. *In re Adoption of Clark*, 95 N.C. App. 1, 13, 381 S.E.2d 835, 842 (1989) (Cozort, J., dissenting).

100. *Id.* at 8-9, 381 S.E.2d at 839-40.

101. See *In re Baby Girl M.*, 37 Cal.3d 65, 75, 688 P.2d 918, 925, 207 Cal. Rptr. 309, 316 (1984) (natural father's parental rights could not be terminated by considering only the best interests of the child without first considering whether an award of custody to the father would be detrimental to the child).

102. *In re Adoption of Clark*, 95 N.C. App. at 8, 381 S.E.2d at 839 (child's welfare should not be dependent on father's knowledge of its existence).

103. *In re Clark*, 76 N.C. App. 83, 86-87, 332 S.E.2d 196, 199-200 (1985).

holding in *In re Clark* and exercise due diligence¹⁰⁴ in attempting to locate the putative father. Such a requirement is a workable alternative to the *In re Adoption of Clark* result. If the agency makes a diligent effort to locate the putative father and is genuinely unable to do so, it then may proceed with the adoption. The adoption process would thus not jeopardize the child's welfare and, at the same time, not diminish the father's rights.

If the adoption agency makes this effort and is unable to locate the father or the father takes no action to legitimate the child if he is located, then the adoptive parents should be able to complete the adoption without the father's consent. The child's adoption should not be slowed by a disinterested father or by a father who genuinely cannot be located. The interested father who can be located, however, would be given the opportunity to develop a relationship with his child and would not have his parental rights taken away as a result of the negligent or dishonest practices of an adoption agency.¹⁰⁵

One final solution to the problems created by the *In re Adoption of Clark* decision and a way to protect the rights of both the putative father and his child is to require a termination of the father's parental rights *before* an adoption petition may be filed. Such a rule would protect the father because it would force adoption agencies to follow the requirement established by the court's decision in *In re Clark*: adoption agencies must exercise due diligence in attempting to locate the putative father.¹⁰⁶ Fathers like Christian Lampe who would have been located if any genuine effort had been made to find them would then have a chance to exercise their parental rights. Conversely, such a requirement would not harm the child. If the adoption agency is genuinely unable to locate the father, his parental rights can be terminated under the North Carolina statute¹⁰⁷ and the child's adoption then can proceed. Not only would the child's interests be unharmed, they would be protected: the child would have the opportunity to establish ties with its natural father.¹⁰⁸

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104. "Due diligence" is "[s]uch a measure of prudence, activity, or assiduity, as is properly to be expected from, and ordinarily exercised by, a reasonable and prudent man under the particular circumstances; not measured by any absolute standard, but depending on the relative facts of the special case." BLACK'S LAW DICTIONARY 411 (5th ed. 1979).

105. See *supra* note 88.

106. *In re Clark*, 76 N.C. App. at 87-88, 332 S.E.2d at 199.

107. See N.C. GEN. STAT. § 7A-289.32(6) (1989).

108. See *supra* notes 100-102 and accompanying text.